UNREDACTED VERSION OF JINHUA'S OPPOSITION TO USA MIL 1 [ECF 274]

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FUJIAN JINHUA INTEGRATED CIRCUIT CO., LTD.

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

v.

UNITED MICROELECTRONICS CORPORATION, *et al.*,

Defendants.

CASE NO.: 3:18-cr-00465-MMC

DEFENDANT FUJIAN JINHUA INTEGRATED CIRCUIT CO., LTD.'S OPPOSITION TO THE GOVERNMENT'S MOTION *IN LIMINE* NO. 1 TO ADMIT STATEMENTS OF AGENTS PURSUANT TO FEDERAL RULE OF EVIDENCE 801(d)(2)(D); DECLARATION OF MATTHEW E. SLOAN AND ATTACHED EXHIBITS

Judge: The Honorable Maxine M. Chesney
Trial Date: February 14, 2022

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I. INTRODUCTION

As explained in more detail in Jinhua's own motions in limine, the government's case against Jinhua is built on speculation and innuendo. *See, e.g.*, Jinhua Motion in Limine No. 6 (ECF No. 248) ("MIL No. 6"). The government asks the trier of fact to conclude that Jinhua conspired with United Microelectronics Corporation ("UMC") to steal and use alleged trade secrets purportedly stolen from Micron Technology, Inc. ("Micron") based on little more than evidence that (1) Jinhua entered into a technology cooperation agreement with UMC (a well-established and capable Taiwanese semi-conductor foundry) to develop new DRAM technology; (2) two *UMC* employees (Kenny Wang and JT Ho) brought alleged trade secrets with them when they left Micron and allegedly referenced some of those documents in their work *at UMC*; (3) at *UMC's* request, Jinhua supplemented the income of certain *UMC employees* (hired from Micron and several other DRAM companies in Taiwan, Korea and Japan) to help attract and retain engineers; and (4) Jinhua eventually hired a UMC employee, Stephen Chen, to be its president. The government has not identified a single email, text or other document or found a single witness who would testify (or provide evidence) that Jinhua knew that UMC employees had allegedly brought Micron documents from their former employer or allegedly looked at them in the early stages of the development process, much less that Jinhua conspired with UMC to misappropriate Micron's trade secrets as the government alleges.

Lacking any first hand evidence, the government has announced in its Motion *in Limine* No. 1 (ECF No. 236) (the "Motion"), that it intends to rely on several out-of-court statements at trial in an attempt to prove the existence of a conspiracy, including statements by purported employees or agents of Jinhua which were (1) provided to Taiwanese agents during an investigation by the Taiwan Ministry of Justice Investigation Bureau ("MJIB") or (2) made during depositions in a related civil matter, *Micron v. UMC et al.*, Case No. 3:17-cv-06932-MMC (N.D. Cal.). These statements are classic hearsay, but the government contends they are admissible under the "employee-agent" hearsay exclusion, Fed. R. Evid. 801(d)(2)(D). For the reasons set forth below, the government will not be able to show that this exclusion applies to either category of statement. In addition, there are significant questions regarding whether the statements taken during interrogations by the MJIB were

fully voluntary and taken with the same procedural safeguards that would be accorded to witnesses and suspects in a U.S. criminal proceeding. Accordingly, the government's Motion should be denied and the government should be precluded from introducing these statements.

II. BACKGROUND

A. Interrogation Records

The government seeks to introduce into evidence statements made by a handful of Jinhua employees and three UMC employees (JT Ho, Ray Guo, and Neil Lee) during interrogations by the MJIB. The government asserts that these "interviews" can be admitted as statements of agents or employees. The government states that these "Interrogation Records" were not custodial and that they were preceded by advisements, including the right to remain silent and have an attorney present. (Mot. at 1:26-2:2.) The government thus implies that these were run-of-the-mill statements by witnesses, protected by all the rights that exist under U.S. law, and that as a result, the "Interrogation Records" should be admitted. It is far from clear, however, whether any of the witnesses at issue here had a "right" to have an attorney present under Taiwanese law. To the contrary, though not experts in Taiwanese law, Jinhua's counsel did not see anything in the Taiwan Code of Criminal Procedure which provides witnesses (as opposed to an accused) with the right to an attorney in interrogations such as these. *See* Hsing Fa [Code of Criminal Procedure], https://law.moj.gov.tw/ENG/LawClass/LawAll.aspx?pcode=C0010001.

Moreover, it is unclear whether these witnesses had a "right" to refuse to testify, akin to witnesses' right to remain silent under the Fifth Amendment to the U.S. Constitution. The "Interrogation Records" reference an advisement being provided under Article 181 of the Code of Criminal Procedure. (*See, e.g.*, Ex. D to the Mot. at 1.) While Article 181 states that a witness can refuse to testify if it would subject him or her to criminal prosecution or punishment, Article 183 appears to limit the exercise of that right. Article 183 states that: "A witness who refuses to testify shall clearly state the reason for such refusal, provided that if one of the circumstances specified in Article 181 exists, such witness may be ordered to make an affidavit in lieu of stating the reason. Approval or disapproval of a refusal to testify shall be by order of a public prosecutor during the stage of investigation or by the ruling of a presiding or commissioned judge during the stage of trial."

See Hsing Fa [Code of Criminal Procedure], art. 183, https://law.moj.gov.tw/ENG/LawClass/LawAll.aspx?pcode=C0010001. It is thus far from clear that the witnesses had an absolute right to refuse to testify. Moreover, the Interrogation Records note that very few individuals, except for JT Ho and a handful of current Jinhua employees, had an attorney present. And even then, the record often does not identify who the defense counsel was and how, if at all defense counsel could participate or did participate in the interrogation. (*See, e.g.* Ex. H to the Mot. at 1.) More concerning is that several of these interrogations were allegedly conducted pursuant to the U.S. government's request under the U.S.-Taiwan Mutual Legal Assistance Agreement ("MLAA") and were conducted after the indictment was returned. Under the MLAA, even if a party makes a claim of self-incrimination, "the evidence, including all items requested, shall nonetheless be taken." MLAA, art. 9, para. 4.

Jinhua wrote a letter to the Government raising concerns about these interrogations in December 2018 (Declaration of Matthew Sloan ("Sloan Decl.") Ex. 1.) Jinhua's counsel stated that using a foreign government to conduct compulsory interrogations of individuals, without the right to an attorney, and without the right to refuse to testify about incriminating matters, when there is a pending U.S. criminal case, raised serious questions about whether these interrogations can and should be introduced into evidence at all in a U.S. trial. *Id.* ("We further understand that the individuals are compelled to attend these interviews, cannot be accompanied by lawyers in these interviews because Taiwanese authorities have characterized them these individuals as 'witnesses,' and cannot refuse to answer any question other than on the ground that the answer would be directly self-incriminatory.").

UMC's counsel raised similar concerns about the summonses issued to the UMC employees, including J.T. Ho, Ray Guo and Neil Lee. In particular, UMC's counsel noted that she had "significant concerns about the propriety of these interviews given the posture of the case, in which an indictment already has been returned and the MLAT request was made only following that event."

(Sloan Decl. Ex. 2 at 2).[1] First, UMC's counsel noted that if these interrogations were conducted in the United States, "it is highly unlikely that the FBI would be able to conduct post-indictment interviews without going through the employee's individual counsel." *Id.* Second, UMC noted that "unlike in the United States, **these interviews are compulsory**. If the individuals do not appear, they will be subject to a penalty and the Taiwanese authorities likely will issue arrest warrants to compel them to attend." *Id.* (emphasis added). Third, UMC's counsel noted that "these individuals cannot be accompanied by counsel and will not have the benefit of advice of counsel in considering whether a question might elicit a response that is self-incriminatory, and must answer questions even if the interviewee would be able to claim 'immunity, incapacity or privilege.'" *Id.* Notwithstanding these concerns, and the potential constitutional concerns these raised (*see id.* at 2 citing *United States v. Allen*, 864 F.3d 63 (2d Cir. 2017)), the United States apparently caused these interrogations to proceed, apparently with an FBI agent and a prosecutor from the U.S. Department of Justice on sight (or nearby) in Taiwan to assist.

B. Overview of Individuals Subject to this Motion

The United States has alleged that Jinhua, along with UMC and employees of UMC, conspired to steal trade secrets from Micron and use those trade secrets to help UMC and Jinhua develop DRAM technology. In its Motion, the government asserts that certain UMC employees were "dual" employees of Jinhua and UMC and that other UMC employees were "agents" of Jinhua. These contentions are neither factually nor legally correct. To orient the Court, Jinhua sets forth below a brief summary of the relevant facts as they relate to each of the UMC employees that are subject to this Motion.

[1] UMC counsel's letter noted that "We further understand that representatives of the U.S. government, including [the AUSA] and an FBI agent assigned to this case, will attend the interviews in person." *Id.* at 1. Although the "transcripts" of the interrogations do not reflect that the AUSA or the FBI special agent were in the room when the interviews were conducted, Jinhua understand that they were in Taiwan and were likely available to be consulted by the Taiwanese authorities.

(cont'd)

1. JT Ho, Ray Guo, and Neil Lee

The government asserts that JT Ho, Ray Guo, and Neil Lee were so-called "dual" employees of Jinhua and UMC. (Mot. at 10:1-22.) They were not.[2] The evidence at trial will show that these individuals were *UMC* employees who participated in an "R&D Talent Retention" program funded by Jinhua. Under this program, *at UMC's request*, Jinhua provided additional compensation to UMC engineers recruited from other DRAM manufactures in order to attract and retain them by supplementing their UMC salaries to make their total compensation commensurate with what they would have received at UMC's competitors. UMC, like some other Taiwanese companies, did not pay competitive salaries compared to the salaries paid by Japanese, Korean and other Taiwanese companies, like Micron. The evidence at trial will show that UMC wanted to recruit skilled DRAM engineers for its project, and thus, was looking at engineers from Japan and Korea. These engineers were often unwilling to work at UMC for the salary UMC offered, so UMC asked Jinhua to provide additional funding to help recruit and retain them. (This was in addition to the $700 million budget cited in the Technology Cooperation Agreement.) Jinhua agreed and offered to supplement the salary of some newly recruited UMC engineers. UMC, as their employer, paid their salary and benefits; they reported solely to UMC; and Jinhua exercised no control over them. The evidence will show, moreover, that neither UMC, Jinhua nor these new UMC recruits ever intended to create an employer-employee relationship between these UMC employees and Jinhua. (*See generally* Declaration of Yu Chen Fu in Support of Jinhua's Opposition to Motions in Limine Nos. 1 and 2 ("Yu Chen Fu Decl.").)

(a) JT Ho

J.T. Ho was an employee of Micron's Taiwanese subsidiary, Micron Microelectronics of Taiwan ("MMT"). He left MMT to join UMC in November 2015 as a "technical manager." (Sloan Decl. Ex. 3 (JT Ho Depo.) at 41:18-20; 64:11-18.) He then held various engineering roles at UMC,

[2] Mr. Lee and Mr. Guo later left UMC and were hired by Jinhua. (Yu Chen Fu Decl., ¶¶ 4–5.) The statements from Mr. Lee and Mr. Guo that the government seeks to introduce here pre-date their employment at Jinhua, and thus are not admissible under Rule 801(d)(2)(D). For the purposes of this Motion, Jinhua is addressing and discussing their work and status at the time he made the statements at issue, well before they joined Jinhua as employees.

finally becoming a "yield enhancing engineer." (*Id.* at 64:19-66:10.) The government contends that because Mr. Ho signed an agreement with Jinhua, he was a Jinhua employee. (Mot. at 14:17-20; Ex. H to the Mot. at 13-21.) But simply signing a form agreement with Jinhua did convert him into a Jinhua employee. In fact, Mr. Ho did not believe he was a Jinhua employee who received a salary. Rather, he identified the payment from Jinhua as a "bonus" or "incentive," not as a salary received by an employee. (Sloan Decl. Exs. 4-5 (JT Ho Interrogation, D-000200) at D-000243.) UMC also did not consider these individuals, including Mr. Ho, to be Jinhua employees. Indeed, in UMC's sentencing memorandum, UMC states that "During the relevant period . . . JT Ho [was a] UMC employee[]." (ECF No. 144 at 4:25-26.)

Neither Jinhua nor Mr. Ho viewed Mr. Ho's receipt of additional funding from Jinhua as creating an employer-employee relationship. Jinhua did not impose any requirements on Mr. Ho or the other UMC employees who participated in the R&D Talent Retention program. For example, Jinhua did not set any requirements on their working hours, locations, or responsibilities. There were no attendance requirements imposed—the individuals did not need to request vacation or leave of absence from Jinhua. They were not supervised by anyone from Jinhua. They did not report to anyone at Jinhua. They were not disciplined by, and did not receive performance reviews from, Jinhua. They did not have Jinhua employee numbers, employee cards, or offices. They did not have Jinhua email accounts. And Jinhua did not provide any of the 'social insurances' that employees are entitled to under Chinese labor law (including the "five insurances," namely medical insurance, pension, unemployment insurance, work injury insurance, reproductive insurance, and "one stipend," namely housing stipend). (*See generally* Yu Chen Fu Decl., ¶ 3.) In short, the government has not met its burden to show that JT Ho is an employee of Jinhua.

(b) Ray Guo

Ray Guo previously worked at MMT, and left MMT for UMC in 2016. (Sloan Decl. Exs. 6-7 (D-0000714) at D-0000715.) The Government contends that Mr. Guo was a joint employee based

on: (1) a draft contract in UMC's email files (which is not attached to the Motion)[3] and (2) statements from another UMC employee—JT Ho—that he travelled with Neil Lee and Ray Guo to China to open an account at a bank there so that Jinhua could deposit money into it. (Mot. at 17:4-14.) This falls far short of showing there was any agreement between Mr. Guo and Jinhua that Mr. Guo would become a Jinhua employee, that there was any payment to Mr. Guo from Jinhua pursuant to that agreement, or that Mr. Guo was Jinhua's agent or employee. And, as set forth in Jinhua's MIL No. 6 and above, even if Mr. Guo did sign such a consulting contract, the purpose of those contracts was to pay a stipend to help UMC retain engineering talent, not to create an employment relationship with Jinhua. As noted above, Mr. Guo later left UMC and was hired by Jinhua as an employee in approximately March 2020. (Yu Chen Fu Decl. ¶ 5.) But the statements from Mr. Guo that the government seeks to introduce here pre-date Mr. Guo's employment at Jinhua, however, and thus are not admissible under Rule 801(d)(2)(D).

(c) Neil Lee

Neil Lee left MMT in late 2015 to join UMC, and worked in UMC's PM2 NBD department as a "deputy director of the etching engineering department." (Sloan Decl. Exs. 8-9 (D-0000790) at D-0000791.) The government does not attach to its motion any signed contract between Mr. Lee and Jinhua. Rather, as with Mr. Guo, it relies on the fact there was a draft agreement provided by Sandy Kuo from UMC (which again, is not attached to the Motion), and that Mr. Lee told the Taiwanese authorities that he received payments from Jinhua. (Mot. at 16:20-17:2.) But again, the government fails to present any other evidence that would establish that Mr. Lee was a Jinhua employee at the time he was interrogated by the Taiwanese authorities in December 19, 2018. (Sloan Decl. Exs. 8-9 (Neil Lee Interrogation, D-000790) at D-000790.) As stated above, Jinhua did not treat these individuals as employees. Moreover, Mr. Lee did not self-identify as a Jinhua employee. When Neil Lee was asked if he was a Jinhua employee, based on one "consulting" contract he signed with Jinhua in February 2017 to obtain this additional renumeration, he said he was not. (Sloan Decl.

[3] The government includes as an exhibit to its Motion a cover email which transmits so-called "employment contracts" of Ray Guo, JT Ho, and Neil Lee, but does not attach the "draft" contracts attached to the email. (*See* Ex. M to Motion; Mot. at 17:5-6.)

Exs. 8-9 (Neil Lee Interrogation, D-000790) at D-000794.) Mr. Lee later left UMC and was hired by Jinhua as an employee in approximately December 2019. (Yu Chen Fu Decl. ¶ 4.) The statements from Mr. Lee that the government seeks to introduce here pre-date Mr. Lee's employment at Jinhua by years, however, and thus are not admissible under Rule 801(d)(2)(D).

2. Jennifer Wang

The government also seeks to introduce statements made during a civil deposition of Jennifer Wang, who is, and during the relevant time period was, a Human Resources Manager *for UMC*. The government does not allege that Ms. Wang signed any sort of so-called "dual employee" agreement or that she was a Jinhua employee. (Mot. at 3:19.) Rather, the government seeks a finding that Ms. Wang she was an "agent" of Jinhua because: (1) she travelled to a job fair with her colleagues from UMC in 2016; (2) at the job fair, she helped recruit engineers to apply for positions at Jinhua; (3) ¶ she attended this job fair at Stephen Chen's direction (who at the time, was a UMC employee); (4) the government contends that Mr. Chen was secretly working as an agent of Jinhua at the time; and therefore (5) Ms. Wang is also an agent of Jinhua's. As discussed in more detail below, this "agent of an agent" theory has no basis in the law, and ignores the applicable facts. Ms. Wang was not *hiring* Jinhua employees at this event, and there is nothing in the record suggesting she had the authority to hire anyone at this event. Rather, she was simply recruiting individuals to *apply* for a position at Jinhua (and interestingly, to the best of Ms. Wang's knowledge, no one was hired at this event). Simply because Ms. Wang was looking to find potential candidates for Jinhua at a single hiring event (Ms. Wang admits that UMC did not help Jinhua in recruiting in any other way), at an event which she attended with UMC employees, at the request of Stephen Chen, who, at the time, was an UMC employee, does not form an agency relationship with *Jinhua*. (*See* Ex. A to the Mot. at 32:10-12.)

3. Stephen Chen

Stephen Chen was the former President of Micron Memory Taiwan ("MMT"), Micron's DRAM business in Taiwan. (Indictment (ECF No. 1) ¶ 7.). He then was hired by UMC in September 2015 as the "Senior Vice President and Fabrication Director." (*Id.*) Mr. Chen was an UMC employee from September 2015 until early 2017, when he was hired as the president of Jinhua, a

role he still serves in today. (Sloan Decl. Ex. 10 (Stephen Chen Depo. Tr., USD-0351510) at 46:11-47:11 (stating that he become an employee of Jinhua in February 2017, but did not begin receiving payment from Jinhua until the second half of 2017.))

The government contends that Mr. Chen was an "agent" of Jinhua from some undisclosed time up and until he was hired as president in early 2017. As support for this argument, the government points out that Mr. Chen attended Jinhua board meetings and received updates from Jinhua—all events consistent with the cooperation agreement the parties had entered. (*See* Mot. at 7:9-12.) Moreover, as the government notes, Chen communicated using his *UMC* address—not a Jinhua address—and even if he was a "point person" to certain vendors, the government does not provide evidence sufficient to show that Mr. Chen was subject to Jinhua's control, which is the touchstone to determine whether Mr. Chen was a Jinhua employee, or that Mr. Chen was authorized to act on Jinhua's behalf (*i.e.*, to enter into contracts on behalf of Jinhua). The government has not provided evidence in is Motion to support its contentions about acts that Mr. Chen purportedly took on behalf of Jinhua, nor evidence to support the delegation of authority from Jinhua for these acts.

Simply because Mr. Chen worked alongside individuals from Jinhua, when he was employed by UMC, as would be expected given that the parties have signed a "Cooperation Agreement" does not make him an agent of Jinhua. Moreover, as discussed in more detail below, the statements the government seeks to introduce from Mr. Chen's deposition are not admissible because they are not on a matter relating to Mr. Chen's employment at *Jinhua*—rather, they are statements relating to his employment at *UMC*.

III. ARGUMENT

A. Statements of JT Ho, Neil Lee, and Ray Guo are Not Admissible under Rule 801(d)(2)(D).

The government seeks to introduce statements made by Ray Guo, JT Ho, and Neil Lee during interrogations conducted by the Taiwan authorities. Specifically, the government contends that these individuals were agents or employees of Jinhua at the time these statements were made, and that the statements are thus admissible under Rule 801(d)(2)(D). In most instances, however, these individuals were not (and never became) Jinhua employees, and, even if they were, the statements

were not made during employment, and were not on a matter within the scope of the individuals alleged *Jinhua* employment.

Statements of agents or employees are admissible against their employer or principle when they concern "a matter within the scope of that relationship" and are made during the individual's employment or agency. Fed. R. Evid. 801(d)(2)(D). The Ninth Circuit has held that a court "must 'undertake a fact-based inquiry applying common law principles of agency'" when deciding whether an individual is an employee or agent for purposes of Fed. R. Evid. 801(d)(2)(D). *United States v. Bonds*, 608 F.3d 495, 504 (9th Cir. 2010) (citation omitted). Here, because these so-called employees were allegedly employed by Jinhua, a Chinese company, the relevant analysis is whether an employment relationship was formed under Chinese law. At trial, Jinhua will proffer expert testimony from Professor Jiang Ying, who will explain why these individuals were not employees under Chinese law. (Sloan Decl. Ex. 11 (Jiang Report) at 12-16.)[4]

1. JT Ho, Neil Lee, and Ray Guo Were Not Jinhua Employees at the Time of their Statements to the Taiwanese Authorities.

To the extent that the government asserts that Mr. Ho, Neil Lee, and Mr. Guo, who allegedly received payments from Jinhua through its "R&D Talent Retention Fund" were Jinhua employees, the government is mistaken. *See* Section II.B, *supra*, and Jinhua's MIL No. 6, both discussing the "R&D Talent Retention Fund." These individuals were not Jinhua employees, and, in the case of Mr. Guo and Mr. Lee, the government has produced scant evidence showing that there was any contractual or payment relationship between Jinhua and Mr. Lee or Mr. Guo. Simply because JT Ho signed an agreement with Jinhua does not make him Jinhua's employee. As noted above, Mr. Ho identified the payments as an "incentive," not "salary." (Sloan Decl. Exs. 4-5 (JT Ho Interrogation, D-000200) at D-000243.) UMC did not consider Mr. Ho to be a Jinhua employee. (ECF No. 144 at 4:25-26.)

[4] The government has submitted an expert report from its purported labor law expert, Dr. Yu-Fan Chiu, opining that (1) Taiwan law should apply and (2) under Taiwan law, there was an employment relationship between Mr. Ho and Jinhua. But as Jinhua's expert Prof. Jiang will explain further at trial, Chinese law should apply, there was no employment relationship between Mr. Ho and Jinhua, and Dr. Chiu's report relies on several mistaken factual premises.

Most importantly, Mr. Ho was not "subordinate" to Jinhua—that is, he was not under Jinhua's control. As Jinhua will set forth in more detail at trial through the testimony of its Chinese labor law expert, Professor Jiang, an employment relationship is formed when an employee is "subordinate" to his or her employer—personally, organizationally, and economically. (Sloan Decl. Ex. 11 (Jiang Report) at 12-16.)[5] For example, for personal subordination, an employer should control the individual's behavior in the workplace, through things like conducting performance evaluations; disciplining the employee; and supervising the work performed. (*Id.* at 7-8.) Organizational subordination includes controlling when the employee works, through things like requirements regarding working hours or locations and controlling vacation and other absences. (*Id.* at 9.) Economic subordination means that the worker receives income mainly or solely from the hiring entity, and the hiring entity bears the operational risks (e.g., provides tools for the work). (*Id.* at 10-11.)

Here, the evidence will show that Jinhua did not control Mr. Ho and that there was no "subordination" in any of the three ways set forth above. Jinhua did not impose any requirements on his working hours, locations, or responsibilities. There were no attendance requirements imposed by Jinhua—he did not need to request vacation or leave of absence from Jinhua. He was not supervised by anyone from Jinhua. And he did not report to anyone at Jinhua. (*See generally* Yu Chen Fu Decl., ¶ 3.) In short, the government has not met its burden to show that JT Ho is an employee of Jinhua.

The evidence with respect to Mr. Guo and Mr. Lee is even weaker. All the above facts are also true as they relate to Mr. Guo and Mr. Lee, and the government has not produced *any* signed agreements between Jinhua and Mr. Guo or Mr. Lee, nor any evidence that they actually received some money from Jinhua at some point in time. Rather, the government rests its entire case on draft agreements and bank accounts that may or may not have been opened. This falls far short of showing

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[5] The government has submitted an expert report from its purported labor law expert, Dr. Yu-Fan Chiu, opining that (1) Taiwan law should apply and (2) under Taiwan law, there was an employment relationship between Mr. Ho and Jinhua. But as Jinhua's expert Prof. Jiang will explain further at trial, Chinese law should apply, there was no employment relationship between Mr. Ho and Jinhua, and Dr. Chiu's report relies on several mistaken factual premises.

(cont'd)

that these individuals had an employment agreement with Jinhua, let alone that they were "subordinate" to Jinhua or were under Jinhua's control.[6]

2. JT Ho was Not an Agent of Jinhua at the Time of His Statements[7]

Apparently recognizing the weakness in its "employee" argument, the government claims that it does not matter if Mr. Ho was an employee, because he was "plainly an agent." (Mot. at 15:25-26.) In doing so, the government looks to the agreement signed by Mr. Ho and Jinhua, and claims that because JT Ho "was employed to work for Jinhua, paid a salary to do so, expected to abide by company polices, and received other benefits" makes him an agent. (*Id.* at 16:1-2.) But this is insufficient to show that Mr. Ho was an agent of Jinhua's. (*See* Mot. at 15:13-19.)

The crux of an agency relationship is assent, control, and instruction. The Ninth Circuit has stated that "an agency relationship exists only if both the provider and the recipient have manifested assent that the provider will act subject to the recipient's control and instruction." *Bonds*, 608 F.3d at 507; *see also Mavrix Photographs, LLC v. Livejournal, Inc.*, 873 F.3d 1045, 1054 (9th Cir. 2017) (as amended) ("Agency is the fiduciary relationship that arises when one person (a 'principal')

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[6] The UMC employees who received these Jinhua bonuses would not be considered agents or employees of Jinhua under U.S. law either. Courts in the United States typically examine the factors set forth in the Restatement of Agency (Second) when determining whether an employee/agency relationship exists, or whether the declarant is an independent contractor. *See Bonds*, 608 F.3d at 504. Such factors that this Court should examine are: (1) the control exerted by the employer, (2) whether the one employed is engaged in a distinct occupation, (3) whether the work is normally done under the supervision of an employer, (4) the skill required, (5) whether the employer supplies tools and instrumentalities, (6) the length of time employed, (7) whether payment is by time or by the job, (8) whether the work is in the regular business of the employer, (9) the subjective intent of the parties, and (10) whether the employer is or is not in business. *Id.* When examining these factors, the Court "will look to the totality of the circumstances, but the 'essential ingredient . . . is the extent of control exercised by the employer.'" *Id.* (quoting *NLRB v. Friendly Cab Co.*, 512 F.3d 1090, 1096 (9th Cir. 2008)).

Here, there is no evidence that Jinhua has ever controlled, or exerted any type of control over, Mr. Ho or the UMC employees who participated in this program. Further, the UMC employees, provided their own instrumentalities—Jinhua did not provide them with office space, a computer, or any equipment. Moreover, the UMC employees did not work under the supervision of anyone at Jinhua, or work at Jinhua's direction. They, at all times, answered to UMC. Accordingly, the totality of the circumstances as they relate to the factors outlined within the Restatement of Agency, demonstrate that the employees who participated in this program were not agents or an employee of Jinhua. (*See generally* Yu Chen Fu Decl., ¶¶ 2–3.)

[7] The government has not argued that Ray Guo or Neil Lee are agents, but should they decide to do so on reply, that argument fails for the same reason.

manifests assent to another person (an 'agent') that the agent shall act on the principal's behalf and subject to the principal's control, and the agent manifests assent or otherwise consents so to act." (quoting Restatement (Third) of Agency § 1.01 (Am. Law Inst. 2006))); *Jones v. Royal Admin. Servs., Inc.*, 887 F.3d 443, 448 (9th Cir. 2018) (same). Both parties must be aware of, and assent to, creating an agency relationship. "To form an agency relationship, both the principal and the agent must manifest assent to the principal's right to control the agent." *Bonds*, 608 F.3d at 506.

Simply because Jinhua agreed, at UMC's request, to supplement the salary of Mr. Ho, or because a contract says that Mr. Ho agreed to abide by Jinhua's policies, or that he "received other benefits" (which the government does not define) does not make him an agent. The government has not presented any proof of the actual workings of the relationship between Mr. Ho or Jinhua, nor of their intent in entering into the agreement. The government has not proved that Jinhua exercised any control over Mr. Ho sufficient to make him Jinhua's agent and thus, has not provided sufficient evidence to show that either Jinhua or Mr. Ho assented to the formation of an agency relationship.

3. The Statements of Neil Lee, Ray Guo, and JT Ho Are Inadmissible Because They Do Not Concern Matters Within the Scope of the Individual's Alleged Relationship with Jinhua.

To be admissible as statements of an agent or employee, the statements must concern "a matter within the scope of that relationship." Fed. R. Evid. 801(d)(2)(D). Even if the government could establish that JT Ho, Ray Guo, or Neil Lee were agents or employees of Jinhua when they were interrogated by the MJIB (which it cannot), the statements that the govt seeks to elicit are not admissible because they were not made within the scope of their alleged relationship with Jinhua. Indeed, many of the statements that the government seeks to introduce here concern the declarant's *UMC* or *Micron* employment, not their purported *Jinhua* employment. For example, the government seeks to introduce statements Mr. Ho made to Taiwanese investigators, including statements about his employment at UMC and his use of electronic devices there. (*See, e.g.*, Ex. J to the Mot. at 2-3; 4; Ex. K to the Mot. at 3.) Even if Mr. Ho was ever employed by Jinhua (which he was not), these statements relate to his employment at UMC, and thus do not relate to a "matter within the scope" of his purported employment or agency *relationship* with Jinhua.

Accordingly, these statements, and the others like these, are not admissible under Federal Rule of Evidence 801(d)(2)(D). Because the government cannot satisfy its burden to show that these individuals were employees of Jinhua, and to the extent they were not speaking on matters within the scope of any purported employment relationship at Jinhua when they made the relevant statements, the hearsay exclusion in Rule 801(d)(2)(D) does not apply, and the statements in Exhibits J, K, L, and O, constitute inadmissible hearsay, and should not be admitted.[8]

B. Statements of Jennifer Wang are Not Admissible under Rule 801(d)(2)(D) Because She is Not an Agent of Jinhua.

The government's attempt to introduce the deposition testimony of Jennifer Wang, an employee in UMC's human resources department, on the grounds that she was purportedly an "agent" of Jinhua under Rule 801(d)(2)(D) are unavailing.[9] First, as discussed above, Ms. Wang never worked at Jinhua, never reported to anyone at Jinhua, never received any compensation from Jinhua, and never signed anything that could even arguably be called an employment agreement with Jinhua. She was, at all times, an employee of UMC. The government contends, however, that Ms. Wang is an agent of Jinhua through a fanciful "agent of an agent" theory which is utterly unsupported in the law. Specifically, the government argues that because Ms. Wang attended a recruiting event in California in 2016 at the direction of Mr. Chen and because Mr. Chen was an authorized agent of Jinhua at the time, that therefore, Ms. Wang's was an agent of Jinhua as well. This argument goes too far, and stretches the bounds of Rule 801(d)(2)(D) as to leave it virtually meaningless.

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[8] Jinhua assumes the government only seeks to introduce the highlighted excerpts of Exhibits A-B; D-L, and O. To the extent the government seeks to introduce additional portions of these documents, the issue is not presented to the Court because the Court does not have the full excerpts to consider. Jinhua reserves all its rights to object to any use of additional excerpts from these documents, should the government seek to introduce them at trial.

[9] To the extent that the government seeks to introduce Ms. Wang's deposition testimony as prior testimony under oath, pursuant to Rule 804(b)(1), it is not admissible because at the time that the depositions were taken in the civil case (June-July 2018), Jinhua had not yet appeared in the case, so Jinhua did not have an opportunity and motive to cross examine the identified deponents (*e.g.*, J.T. Ho, Jennifer Wang, and Stephen Chen). *See, e.g.*, *Micron v. UMC et al.*, Case No. 3:17-cv-06932-MMC (N.D. Cal.), ECF Nos. 98-107 (indicating that Jinhua's first appearance in the civil action was not until October 2, 2018). *See* Fed. R. Evid. 804(b)(1)(B) (providing that prior deposition testimony of deponent is excluded from hearsay rule where the deponent is "unavailable" and the party against which the testimony is offered had "an opportunity and similar motive to develop" the witnesses' testimony through direct or cross- examination).

1. Ms. Wang was Never an Agent of Jinhua.

Rule 801(d)(2)(D) is not only a rule about hearsay, it is a powerful rule of attribution. It takes ordinary hearsay and makes the statement attributable to the employer or principal. At the heart of the rule is the law of agency, and the touchstone of agency is the consent of the principal and agent. An agent is one who "act[s] on the principal's behalf and subject to the principal's control." *Bonds*, 608 F.3d at 506 (alteration in original) (quoting Restatement (Third) Agency § 1.01). As stated above, "[t]o form an agency relationship, both the principal and the agent must manifest assent to the principal's right to control the agent." *Id.*

Here, the government has presented no evidence that either Ms. Wang or Jinhua intended to form an agency relationship. Simply because she was looking to find potential candidates for Jinhua at a single hiring event in 2016 (Ms. Wang admits that UMC did not help Jinhua in recruiting in any other way), at an event which she attended with UMC employees, at the request of Mr. Chen, who, at the time, was an UMC employee, does not form an agency relationship with *Jinhua*.

2. Ms. Wang was Not an Agent of Jinhua at the Time of Her Statements at Issue in this Motion.

Even assuming *arguendo* that Ms. Wang was an agent of Jinhua in connection with the recruiting fair in 2016, there is no evidence that she was an agent of Jinhua at the time she made the statements the government seeks to introduce in this Motion. For a statement of an agent to be admitted pursuant to Rule 801(d)(2)(D), the individual must be the agent of the principal against whom the statement is admitted *at the time the statement is made*.

The government seeks to introduce statements Mr. Wang made at a deposition in July *2018*. But the government bases its agency arguments on one recruiting fair Ms. Wang attended in *2016*. Even if Ms. Wang was an agent of Jinhua for the purposes of the recruiting fair in 2016—which she was not—the government has made no showing that Ms. Wang was a Jinhua agent *at the time of her deposition* in July 2018. There is no evidence that Mr. Chen, or others at Jinhua, had asked Ms. Wang to do anything on behalf of Jinhua after the recruiting fair, and certainly not in or around July 2018. In fact, Ms. Wang testified that she only helped Jinhua with its recruiting efforts this one time. (Ex. A to the Mot. at 32:10-12.) For this reason alone, the government's Motion as it relates to

admitting statements from the deposition of Jennifer Wang, as set forth in Exhibit A, should be denied.

C. Statements of Stephen Chen are Not Admissible under Rule 801(d)(2)(D).

The government also seeks to introduce statements made by Stephen Chen during his deposition in the same related civil matter, *Micron v. UMC et al.*, Case No. 3:17-cv-06932-MMC (N.D. Cal.). The government contends that Mr. Chen was an employee of Jinhua at the time of his deposition in July 2018, and that, as a result, his testimony is admissible. The government also contends that Mr. Chen was an agent of Jinhua prior to being appointed president of Jinhua, and that statements by Mr. Chen are therefore admissible for this reason as well. While Mr. Chen was an employee of Jinhua as of his July 2018 deposition, Mr. Chen was not an agent or employee of Jinhua prior to his employment at Jinhua in February 2017.

1. Mr. Chen was Not an Agent for Jinhua Prior to February 2017.

The government argues that Mr. Chen is an agent of Jinhua, so that statements he made "while an agent of Jinhua and concerning the TCA are admissible at trial against Jinhua." (Mot at. 14:4-5.) But the government makes this argument in a vacuum, and does not identify which statements it is seeking to introduce under this theory. The only statement from Stephen Chen submitted in support of the Motion is his July 2018 deposition, but by that time, he was an employee of Jinhua, not an agent. Jinhua is unsure what statements, if any, the government seeks to introduce under the theory that Stephen Chen was an "agent" of Jinhua. The Court should not issue a broad order *in limine* that all statements made by Mr. Chen "while [he was] an agent of Jinhua and concerning the TCA are admissible" in a vacuum.

Regardless of what statements they may point to at trial, however, the government has not proffered sufficient evidence to show Mr. Chen was an agent of Jinhua prior to becoming president of Jinhua in 2017. As stated above, an agent is one who "act[s] on the principal's behalf and subject to the principal's control." *Bonds*, 608 F.3d at 506 (alteration in original) (quoting Restatement (Third) Agency § 1.01). "To form an agency relationship, both the principal and the agent must manifest assent to the principal's right to control the agent." *Id.* Here, the government has failed to present any admissible evidence that Mr. Chen was an agent of Jinhua. Attending Jinhua board

meeting and receiving updates from Jinhua is consistent with the cooperation agreement the parties had entered into. Because of the cooperation agreement, employees of both parties would necessarily work together in a variety of settings. It does not mean they entered into an agency relationship. Moreover, as the government notes, Chen communicated using his *UMC* address—not a Jinhua address—and even if he was a "point person" to certain vendors, the government does not provide evidence sufficient to show that Mr. Chen was subject to Jinhua's control or that Mr. Chen was authorized to act on Jinhua's behalf (*i.e.*, to enter into contracts on behalf of Jinhua).

The government claims that Mr. Chen "hired for Jinhua." (Mot. at 13:27-14:1.) The evidence the government cites in support of his "hiring" role are statements by various witnesses that they spoke to Mr. Chen about a job at Jinhua before being hired, and that they did not interview with anyone else. (Mot. at 9:9-26.) But that is not "hiring" for Jinhua. For example, the government does not provide any evidence that Mr. Chen entered into contracts with these individuals on Jinhua's behalf prior to February 2017. The government also claims that Mr. Chen "entered into business contracts for Jinhua at the time of the recruiting fair" and thus, as a result, was an "authorized agent for Jinhua." (Mot. at 13:26-14:1.) The government provides no detail about what these "business contracts" may be. The fact he attended a single hiring event (Ms. Wang admits that UMC did not help Jinhua in recruiting in any other way) looking to find potential candidates to simply *apply to* Jinhua—not to hire them—at an event which he attended with UMC employees does not form an agency relationship with *Jinhua*. To do so would stretch the bounds of the agency relationship and open the flood gates to potential hearsay to be admitted.

2. The Statements Are Inadmissible Because They Do Not Concern the Scope of Mr. Chen's Alleged Relationship with Jinhua.

Rule 801(d)(2)(D) requires more than simply showing an individual is an employee or agent at the time of the statement at issue, however. The statement must also be about the scope of the employment of the entity against whom it is offered. *See* Fed. R. Evid. 801(d)(2)(D). Here, some of Mr. Chen's statements in his deposition, as identified by the government, relate to his employment with *UMC*, not *Jinhua*. (*See, e.g.*, Ex. B to the Mot. at 52:16-22 (discussing UMC's equipment); 77:21-78:10 (discussing activities he took at the time he was an employee of UMC).) Thus, these

statements are not admissible against Jinhua. The government's order is overbroad, seeking to admit statements that clearly outside of the scope of Rule 801(d)(2)(D).

D. Statements by All UMC Employees Working on Project M Are Not Admissible Against Jinhua Under Rule 801(d)(2)(D).

Finally, the government argues for a blanket catch-all order that statements of any UMC employee "working under Stephen Chen" can be admissible against Jinhua under Rule 801(d)(2)(D) because "all of these employees reported to Stephen Chen at UMC, who wore dual hats with Jinhua." (Mot. at 17:16-20.) The government contends that Jinhua therefore had control over these employees through Stephen Chen. (*Id.*) The government does not ask the Court to make any order with respect to these unnamed employees, as it notes that "the Court may benefit from the evidence at trial on the fact intensive inquiry on this category of statements" and then offers "to lay a foundation at trial that certain UMC employees were agents of Jinhua . . . and to seek a ruling after laying necessary foundation through evidence presented at trial." (Mot. at 17:20-24.)

Jinhua, therefore, will also defer its full argument on this issue until the government proffers such evidence at trial, but notes that such an extension of Rule 801(d)(2)(D) renders the rule meaningless. The Court should be guided by the principles underlying this rule: That agents typically would not make statements damaging against their principal, and thus, these statements and sufficient indicia of reliability to justify an exception from the traditional hearsay rules. *See Nekolny v. Painter*, 653 F.2d 1164, 1172 (7th Cir. 1981); *Weil v. Citizens Telecom Servs. Co.*, 922 F.3d 993, 1000 (9th Cir. 2019). But when someone is an "agent of an agent"—like the government contends here—the same safeguards are not present. It is likely that none of these individuals viewed themselves as agents of Jinhua. And that, in and of itself, causes the government's argument to fail. An agent is not only one who is subject to the control of a principal, but to form an agency relationship, "both the principal and the agent must manifest assent to the principal's right to control the agent." *Bonds*, 608 F.3d at 506. Here, the government has presented no evidence to show that any of these unnamed UMC employees manifested the intent that they be under Jinhua's control. Thus, this Court should not issue any order that any UMC employees who were under the control of Jinhua were agents of Jinhua.

E. Statements of Que Liangwu, Chen Shiyan, Hero Lo, Xiao Xinhuang, and You Zhenfu are Not Admissible Under Fed. R. Evid. 801(d)(2)(D).

The government has indicated it may try to introduce certain hearsay statements under Rule 801(d)(2)(D) as statements of Jinhua's employees or agents. Specifically, it seeks to introduce statements made by Jinhua employees Que Liangwu, Chen Shiyan, Hero Lo, Xiao Xinhuang, and You Zhenfu during interrogations conducted by the Taiwan authorities. (Exs. to the Mot. D-H[10].) Jinhua does not dispute that Chen Shiyan, Hero Lo, Xiao Xinhuang, and You Zhenfu were Jinhua employees at the time of their interrogations by the MJIB. But Que Liangwu was not a Jinhua employee. His role was that of part-time accounting consultant. (Yu Chen Fu Decl. ¶ 7.) And, at any rate, the government has failed to meet its burden that all thec statements of the so-called employees made were within the scope of the individuals' employment at Jinhua.

For example, in the Interrogation Record of Chen Shiyan, attached as Exhibit D to the Motion, the highlighted portion relates to Mr. Chen's discussion of how he was hired at Jinhua, including his prior employment at Micron. This is outside the scope of his employment at Jinhua, and should not be admitted under Rule 801(d)(2)(D). Similar statements are highlighted in the Interrogation Record of Hero Lo (Ex. E to the Mot. at 2); Xiao Xinhuang (Ex. F to the Mot. at 2-3); Que Liangwu (Ex. G to the Mot. at 2); and You Zhenfu (Ex. H to the Mot. at 2-3).

Additionally, for the reasons set forth in Section III.F, below, these transcripts should not be admissible as evidence in this case.

F. This Court should Deny the Government's Request to Introduce the Interrogation "Transcripts" Because of Procedural Deficiencies.

As discussed in the introduction, there are numerous questions about the procedures and rights afforded to the individuals during their interrogations by the MJIB, including whether a witness had the right to an attorney; whether and to what extent the witnesses were able to invoke a

[10] The government states in its motion it seeks to admit the statements of five employees from Jinhua: Que Liangwu, Chen Shiyan, Hero Lo, Xiao Zinhung, and You Zhenfu, citing to Exhibits D-I. (Mot. at 13:2-7.) Exhibit I, however, is an Interrogation Record of Wu Kungrong, who the government does not mention in the Motion as one of the employees for whom it is seeking admission of his statements. It is unclear whether the government is seeking an order admitting the Record in Exhibit I.

privilege against self-incrimination; and what if any consequences would ensue if the witness did not sit for an interview. Indeed, contrary to the government's claims, these "interviews" had many hallmarks of a "custodial" interrogation with few of the protection typically provided in criminal proceedings in the United States. For example, UMC's counsel expressed her belief that "[i]f the individuals do not appear, they will be subject to a penalty and the Taiwanese authorities likely will issue arrest warrants to compel them to attend." (Sloan Decl., Ex. 2 at 2.) Jinhua's counsel raised similar concerns. (Sloan Decl., Ex. 1 at 2.) Moreover, to the best of Jinhua's understanding, with the exception of Mr. Ho, who was apparently a target of the Taiwanese investigation, and a few current Jinhua employees, the witnesses were not allowed to be accompanied by counsel and did not have the benefit of advice of counsel in considering whether a question might elicit a response that is self-incriminatory. (*id.* ("[w]e further understand that the individuals are compelled to attend these interviews, [and] **cannot be accompanied by lawyers in these interviews** because the Taiwanese authorities have characterized these individuals as 'witnesses'") (emphasis added); *see also* Sloan Decl., Ex. 2 at 2. (raising similar concerns)). Even if counsel did participate, it is unclear whether the witnesses had the right to consult with counsel. In fact, while some interviews contain a notaion that defense counsel was present, there is no indication *who* this was, and there is no indication of the role, if any that counsel played in the interrogation. (*See, e.g.*, Ex. H to the Mot. at 1.) Moreover, even with counsel present, it appears the witness could be compelled to "answer questions even if the interviewee would be able to claim 'immunity, incapacity or privilege.'" (Sloan Decl., Ex. 2 at 2.) Notwithstanding these concerns, and the potential constitutional concerns these raised, the United States caused these interrogations to proceed, apparently with an FBI agent and a prosecutor from the U.S. Department of Justice on sight (or nearby) in Taiwan to assist.

In light of the questions regarding this lack of procedural safeguards, the Court should deny the government's requests to introduce the statements from these interrogations at trial, much less the raw "transcripts" generated by the Taiwanese authorities. While Jinhua has no constitutional right against self-incrimination under the Fifth Amendment, its employees—as well as those whom the government incorrectly claims are Jinhua's agents or employees—do have Fifth Amendment rights to the extent the government seeks to use their statements against them in criminal proceedings

in the United States. *United States v. Allen*, 864 F.3d 63, 101 (2d Cir. 2017) ("The Fifth Amendment's prohibition on the use of compelled testimony in American criminal proceedings applies even when a foreign sovereign has compelled the testimony. To be clear, we do not purport to prescribe what the U.K. authorities (or any foreign authority) may do in their witness interviews or their criminal trials. We merely hold that the Self–Incrimination Clause prohibits the use and derivative use of compelled testimony in an American criminal case against the defendant who provided that testimony."); *see also Brulay v. United States*, 383 F.2d 345, 349 n.5 (9th Cir. 1967) ("[I]f the statement is not voluntarily given, whether given to a United States or foreign officer[ ]—the defendant has been compelled to be a witness against himself when the statement is admitted.")

Given these concerns about the Taiwanese government's lack of procedural safeguards, the Court should exercise its discretionary authority to exclude such statements when the government seeks to use such testimony against a defendant, including a corporate defendant like Jinhua. This is especially appropriate when, as here, the U.S. government specifically requested the foreign authorities to conduct at least some of the interviews even after the case was indicted and Jinhua and UMC were represented by counsel, and did so over the objections of both UMC's and Jinhua's company counsel. Put simply, the government should not be able to ask for testimony to be taken by foreign law enforcement in another country—or to benefit from such interrogations—when the witnesses were denied important constitutional protections, designed to ensure the credibility and voluntariness of such statements, that would be afforded if the interviews took place in the United States.

At a minimum, this Court should require the government to call the MJIB agents and prosecutors who were present at these interviews so that they can be cross examined about the accuracy and adequacy of the records, the facts and circumstances surrounding the questioning, and what rights, if any, were afforded to the witnesses. The U.S. government, as is its right, has decided to prosecute a case in the United States despite pending criminal proceedings relating to the same issues in Taiwan. But the fact that the Taiwan government may have taken some investigative activities that the U.S. government seeks to use in this case does not absolve the government of its requirement to present trustworthy, credible, admissible evidence under the Federal Rules.

IV. CONCLUSION

For the reasons set forth above, this Court should deny the government's Motion to admit hearsay statements that employees of UMC or Jinhua provided to Taiwan law enforcement and in depositions in a civil lawsuit.[11]

Dated: December 22, 2021

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[11] If 801(d)(2)(D) does not apply, then these statements are hearsay, and should not be admitted for the truth of the matter asserted. Jinhua notes the statements made to the Taiwanese MJIB and in the civil depositions because these statements were testimonial in nature and Jinhua did not have an opportunity to cross examine these witnesses, so admission of these statements would violate the Confrontation Clause depending on what other hearsay exception or exclusion may apply. *See Crawford v. Washington*, 541 U.S. 36, 51-52 (2004). Jinhua reserves its rights to make any and all other objections, including based on the Confrontation Clause, if and when these statements are presented at trial.